

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 575 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

KOHYA BHAICHAND DAMOR

Versus

STATE OF GUJARAT

Appearance:

MR JM BUDDHBHATTI for Petitioner

MR ST MEHTA ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 15/10/1999

ORAL JUDGEMENT

#. The appellant is the original accused convicted for the offence punishable under Section 376 of Indian Penal Code. The learned Additional Sessions Judge of District Sabarkantha camping at Modasa convicted the accused at the end of the trial of Sessions Case No : 94 of 1995 and imposed R.I. for 7 years and fine of Rs.500/- and in default R.I. for 15 days.

#. This appeal is preferred from jail by the accused and at the request of the appellant accused, this Court has appointed Mr.J.M.Buddhabhatti to present the case of the appellant.

#. Vide order dated 1st October, 1996, the appeal is admitted. The appellant accused was in judicial custody pending trial prayed for bail pending appeal the same was refused by this Court on the day of admission of this appeal. I have heard the submission of Mr.Buddhabhatti for the appellant and Mr.S.T.Mehta, learned APP appearing for the respondent State of Gujarat.

#. It would be proper and also convenient to narrate the case of the prosecution in brief. The victim Mashiben Nathabhai is the complainant and she lodged a FIR at Megharaj police station on 1st May, 1995. According to the case of the prosecution, this Mashiben daughter of Nathabhai Kalabhai Damor was raped by the appellant in early hours of 1st May, 1995 when she was sleeping on cot in the open abutting area of residential house at village Rayawada of Taluka Megharaj. The family of Mashiben is the original residents of village Sarangpur of that very taluka. According to the complainant, she had married to one Rayabhai Ratnabhai Tabiyad of village Tumbalia 5 years prior from the date of incident and as she was physically weak and not able to do any labour work, she had returned to the house of her father approximately 1 year back from the date of incident. Her husband had married to some other lady so she was staying with her father. Her brother and some other family members are residing at village Sarangpur and as her father had sustained fracture injury about 20 days before the incident. The father and mother along with other brothers had gone to Sarangpur. Two sisters viz. Mashiben and Shobhaben aged about 4 years were at village Rayadawada house. In early hours of 1-5-1995 at about 1.30 A.M. when she was sleeping on a cot and her sister was on another cot adjacent to her, the accused Koyabhai came to her cot and overpowered the victim Mashiben and raped her. It is the case of the prosecution that she tried to pull the accused Koyabhai but as the accused was having enough strength, he over powered and raped her (the complainant). The younger sister Shobhaben was in the adjacent cot, had also seen the incident. In the early hours of the day of incident, the complainant went to village Sarangpur to inform about the offending act committed by the accused to her father. After committing the offence of rape, the accused had run away. According to the prosecution, there are no other house in the near

vicinity of the house of the complainant and she had opted to go to Saragpur and informed the father. Ultimately, it was decided that the brother of the complainant should go to police station and lodge the complaint but one Pravinbhai Soni of Meghraj anyhow took this brother Chandubhai asking him not to file any complaint about the incident but the complainant herself reached the police station and filed the complaint at about 10.30 a.m. and the offence was registered against the accused.

#. Trial against the accused was conducted in the Court of Additional Sessions Judge, Sabarkantha camping at Modasa and after appreciating the evidence led by the prosecution, the Court convicted the accused as aforesaid. The appellant accused was offered opportunity to explain incriminating evidence led by the prosecution under Section 313 of Code of Criminal Procedure but the say of the appellant before the trial court was that he has been falsely implicated in the offence. During the course of examination of prosecution witnesses, it was suggested to some of the witnesses that Rs.5000/- was lent to the father of the complainant by the accused and the father of the complainant was not inclined to return that amount, the appellant has been falsely implicated in the serious offence. It is important to note that this suggestion is denied by the witnesses and thereafter, the accused has not taken this plea at the time of offering his explanation against the evidence led by the prosecution in his statement under section 313 of CrPC. I have gone through the entire evidence led by the prosecution, oral as well as the documentary and the reasons given by the learned Additional Sessions Judge holding the accused guilty of the offence punishable under Section 376 of IPC.

#. It is settled legal position that sole testimony of prosecutrix in a case under Section 376 of IPC is sufficient to hold accused guilty if such testimony is a cogent and convincing evidence. Ring of truth in such sole version if heard without any corroboration, prosecution can link the accused with crime. The case on hand is such a nature, even then, the learned Additional Sessions Judge has not accepted the sole evidence of the prosecutrix but has also considered the other relevant aspects and the learned Additional Sessions Judge has rightly held that totality of the evidence is sufficient to hold the accused guilty. Mr. Buddhabatti appearing for the appellant has submitted that the learned Additional Sessions Judge ought to have held that the version of the complainant Mashiben is not corroborated by medical

evidence. Not only the medical evidence including the certificate issued by the Doctor who have examined the complainant - Mashiben and accused Koyabhai cuts the case of the prosecution and uncorroborated testimony of Mashiben ought not to have been accepted. Young sister of Mashiben aged about 4 years has not identified the accused. She was declared hostile and therefore, the evidence of PW-2 Shobhaben is absolutely irrelevant. It is also submitted that the complainant was habitual of sexual intercourse and there were no mark of violence on her body found at the time of medical examination. Non examination of important witnesses viz. the father of the Mashiben who must have been told by Mashiben about the incident and the brother Chandubhai who had allegedly gone to the police station to lodge FIR, affects adversely to the case of the prosecution. It is also argued that as per the case of the prosecution, alleged incident has occurred at about 1.30 a.m. There was total darkness. There is nothing in the evidence which can show that there was sufficient light so this may be a case of mistaken identity. There is ample scope that somebody else might have relation with prosecutrix Mashiben and she has falsely implicated the accused because of inimical terms between her father and the complainant on account of some monetary transaction. Mr. Buddabhatti has placed his reliance in case of RAMCHANDRAN VS. STATE OF GUJARAT reported in 1993 Criminal Law Journal pg.1825 wherein, the Madhya Pradesh High Court has held the accused innocent. In the case before the Madhya Pradesh High Court, the victim was married woman and the Court has accepted that in such cases, the version of the prosecutrix must have corroboration. Uncorroborated testimony should not be accepted. The ratio of this judgment would not help the present appellant because on careful reading of entire bunch of record as well as the documentary evidence, I am satisfied that the version of Mashiben is corroborated from more than one corners. She has categorically stated in her deposition that at the time of incident she was not under fast sleep. According to her, she was sleeping on cot in open corridor abutting to her house and her young sister was also sleeping nearby. Accused Koyabhai during night hours came to her cot and ridged her body and ultimately raped her. She has identified the accused in the court room. She has also stated that she was overpowered by accused. In the cross examination, it is stated that she is not divorcee but simply states that her father on account of matrimonial dispute she had filed a suit for maintenance and ultimately that case was compounded. It was suggested to some witnesses that this appellant was one of the persons who were negotiating for

the compromise. So the question of mistaken identify raised by Mr. Buddabhatti before this Court is not acceptable. I agree that the suggestion made by the accused during the course of cross examination to a witness is not binding to him but undisputedly this appellant is residing in the near vicinity in the same village and was active when the maintenance suit filed by the prosecutrix was pending with other persons including Pravinbhai Soni. The reference of Hindu festival day AKHATRIJ is also referred to by Mashiben and she has given the details about the spot of incident. It is amply clear that there was nobody except her younger sister in the immediate vicinity when she was raped. The learned defence counsel had tried to bring some political enmity between two families during the course of cross examination of prosecution witnesses but the testimony of the prosecutrices has remained unturtled. There is one contradiction which is proved by the defence counsel but the same does not go to the root of the version of the complainant. The conduct of the prosecutrix of lodging the FIR in couple of hours of the incident, supports her version and it can be said that this witness is consistent in her say. Merely who is residing in the parental home, if raped then, normally such victim lady would not rushed to the police station but would try to narrate the incident to the family members preferably mother and / or father or any other elderly member. Herein in this case, it is on record that parents of the victim were at village Saranjpur and in the early hours of the day of incident, she had gone to Sarangpur and it seems that on collective decision, the complaint is filed. Non examination of Pravinbhai Soni and Chandubhai is not at all important because it is on record that Pravinbhai Soni had tried to influence Chandubhai or not lodging FIR. FIR is lodged at about 10.30 a.m.. The report made by the police to the learned JMFC under Section 157 of CrPC indicates that village Rayadawada is at a distance of 12 kms from the police station. There must be some distance between village Sarangpur and Rayadawada. Every step towards the village Sarangpur, where the parents were, can be equated with each step towards police station. The conduct of the prosecutrix to inform her parents immediately conveys that she was very much aggrieved by the act of the appellant accused. The difference between the age of accused and the prosecutrix is also relevant. As per the record, the prosecutrix was around 23 to 25 years of age, whereas the accused was of 45 to 46 years of age. Absence of any elderly member in the house of prosecutrix at Rayadawad could be known to the persons who stay in the near vicinity or to the persons who are otherwise related or

known family of the father of the victim. This fact also cannot be ignored.

#. PW-II Shobha is the a child witness. She has not named the accused in her deposition. She was declared hostile to prosecution but the Court can legally take assistance of oral evidence of such hostile witness. The hostile witness can partly corroborate the prosecution case. She has stated in her deposition that she was sleeping nearby her sister Mashiben on the date of incident. She has also stated that somebody had come and had ridden the cot of Mashiben and was beating Mashiben. Though she has stated this, she has not identified that person but she had given in gestures in identifying the appellant when the appellant when the accused was in box. The plain reading of the evidence of Cheharabhai gives impression that she had rightly identified the appellant accused when he was in witness box. She has denied all the material suggestion made by the learned defence counsel, so I do not agree with the submission of Mr.Buddhbhati that there is no corroboration from this witness Mashiben. Though this witness is child witness and her evidence should be evaluated with utmost care and after close scrutiny. Any part of such evidence should be taken by way of corroboration piece of evidence. But the say of this witness as to visit of somebody at the cot of Mashiben during the night and she was sleeping nearby the victim Mashiben is very important. The presence of this child witness is there in the FIR. The prosecution has remained fair from the beginning otherwise there was ample scope in introducing other witnesses who were normally residents of village Rayakawada with prosecutrix. Apparently, one can feel that the FIR is lodged after some hours but looking to the above stated facts and circumstances, FIR lodged in couple of hours in police station which is situated at distance of 12 kms cannot be said to be a delayed FIR. The FIR cannot be read as the substantial piece of evidence but can be considered a vital evidence for appreciation of the evidence led by the prosecution. It gives an impression that straightway FIR was lodged by the victim herself and the version of the victim Mashiben is amply corroborated by this document.

#. The case of the prosecution is also corroborated by the medical evidence. The deposition of Dr.B.K.Solanki says that the appellant was physically competent to commit a rape. Absence of mark of violence on the body of the victim lady Mashiben is also not relevant because she is at the relevant point of time was young married lady of around 24 to 25 years of age. The case of the

prosecution is consistent that as the Mashiben was physically weak, the accused overpowered her and committed raper. Doctor who has examined Mashiben has not been cross examined by the defence counsel as to physical strength of Mashiben. The doctor has stated that in such cases, normally mark of violence or any injury on the private part are not found but the lady Doctor has stated in her deposition that two glass slides were prepared from the posterior formix of vagina with the help of sterilized dry cotton. Her blood saliva was also taken and was also examined and the same were sent for examination of the Forensic Science Laboratory in sealed condition. The lady Doctor has also seen some white patches on the petticoat (known as chaniya). This was also sent to the Forensic Science Laboratory. Undisputedly, the victim lady at her parental house since more 1 year from the date of incident and there was litigation between the spouse and petition for maintenance was preferred. It is nowhere suggested to the prosecutrix that her husband was visited the house or she had some relation with any other male person. On perusal of FSL report, I found that both these slides sent to FSL were found positive and simens were found presence on these slides. The petticoat was also found with the stains of semen and group of semen as per the examination was also found of A group. Mr. Buddhabhatti has argued that as per the panchanama drawn by investigating officer, about the seizure of the cloths of the accused including the Dhoti, shows no visible marks or stains on dhoti. Even then the FSL has opinion that Dhoti was stained with semen of A-Group. This seems to be a created evidence. So, the same should be viewed with doubt. Even for the sake of argument, if the submission of Mr. Buddhbhatti is accepted, even then, the same would not help the appellant accused. The entire reading of the judgment of learned Sessions Judge leads me to arrive at a conclusion that the findings of the learned Sessions Judge is based on sound reasoning and the same is arrived at after close scrutiny of the evidence led by the prosecution. There was no reasons for the prosecution to examine the father of the victim because it is not there in evidence of Mashiben that she had told everything to her father. The suggestion made to some of the witnesses as to role of Pravinbhai Soni for the incident also does not bring any clue to corroborate the evidence led by the prosecution. Merely because the married lady is raped and as there was no mark of violence and / or injury on the body of the prosecutrix, the case of the prosecution should not be viewed with doubt or suspicion. falsity of the defence and / or haphazard or inconsistent defence pleaded by the accused also become relevant in such

cases. When the prosecution has proved his case beyond doubt then, it is obligatory duty on the part of the accused to rebut such evidence by placing strong defence. So, I am not inclined to accept the submissions of Mr.Buddhabhatti on any count.

#. Mr.Buddhbhatti alternatively submitted that accused is in jail since more than 3 years and considering the remission which normally would be offered to the appellant, at the end of the total period of sentence, this Court should reduce the sentence by assigning the special reasons to the period already undergone. But learned APP Mr.Mehta has drawn the attention of this Court by placing a sheet issued by the Deputy Superintendent of Central Jail, Sabarmati Ahmedabad. The sheet shows that the accused was granted temporary bail on 7th November, 1996 to 26th November, 1996 - 21 days but he failed to surrender to the jail authority on completion of the bail period and was found absconding. After 462 days, he was arrested by police and has been committed to jail custody so for approximately 483 days the accused had remained outside the jail. He is defaulter in gross, no mercy can be shown to him. Punishment and sentence inflicted by the Sessions Court is upheld. So, this appeal deserves dismissal and therefore, the same is dismissed accordingly. The order of conviction and sentence passed by the learned Additional Sessions Judge stands confirmed. No costs.

Date : 15-10-99

[C.K.Buch, J.]

#kailash#